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WHAT DOES EUROPE DO ABOUT FAIR COMPETITION IN INTERNATIONAL AIR TRANSPORT? A CRITIQUE OF RECENT ACTIONS

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Abstract

The States' perception of what constitutes fair competition in international air transport has evolved from a quid pro quo approach in the era of airline regulation to a laissez-faire approach in the era of airline de-regulation. However, no consensus has ever been reached as to, first, what constitutes fair competition in an industry whose market access is still contingent on bilateral air services agreements (ASAs), and, second, what the pre-requisites of a level playing field are. The commercial success of the Gulf airlines has obliged regulators and policymakers around the world to revisit this issue and demand compliance with global rules. The EU has responded by adopting Regulation (EU) 2019/712 on safeguarding fair competition, as well as by championing the inclusion of fair competition clauses in ASAs. The analysis examines the compatibility of unilateral action under the Regulation with mutually negotiated solutions under ASAs so as to assess the legitimacy and efficiency of the EU strategy in the area of fair competition in international air transport.

1. Introduction

The quest for fair competition in international air transport is as old as the regulation of commercial aviation. The 1944 Chicago Convention, which is often referred to as the Constitution of international civil aviation, refers to "equality of opportunity" in international air transport services in its Preamble.[1] It further sets out the objectives of "efficient and economical air transport", "prevent[ing] economic waste caused by unreasonable

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1. "[T]he undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity

competition" and "a fair opportunity to operate international airlines".[2] When the Chicago Convention was drafted, i.e. during the last days of World War II, equality of opportunity and fair competition referred more to the right of sovereign States to participate in the provision of air services on an equal basis with other States. Such a right legitimized the adoption of restrictive domestic regulation, whereby the operation of international air services over or into a State's territory was (and, as a matter of fact, remains) subject to that State's special permission and terms.[3] Moreover, it legitimized States to subsidize their national (usually publicly-owned) air carriers.

Today, fair competition in international air transport has a very different meaning. The economic regulation of the sector has evolved since the Chicago Convention from a restrictive regime, whereby all aspects of air services were agreed between or approved by national governments, to a more liberal regime, whereby air carriers enjoy considerable freedom in the provision of air services. Despite this regulatory progress, international air transport has not been liberalized multilaterally. Instead, the liberalization is piecemeal and has been achieved bilaterally by means of air services agreements (ASAs) concluded between States, colloquially known as open skies agreements. Such agreements ease restrictions with respect to market access, capacity, frequency, pricing and other aspects of air services. As a result, States lack a common understanding of fair competition. If one accepts that fair competition can only be exercised on a level playing field, States also seem to disagree on the latter. The International Civil Aviation Organization (ICAO) has stated that "there is currently no commonly accepted definition of the conditions constituting a level playing field" and "it is unlikely that consensus on a comprehensive definition can be achieved at this time, given the widely different circumstances of States and their aviation sectors…".[4]

and operated soundly and economically". Convention on International Civil Aviation, *opened for signature* 7 Dec. 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force 7 Apr. 1947).

2. Ibid., Art. 44(d), (e) and (f) of the Chicago Convention provide: "The aims and objectives of the [International Civil Aviation] Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to: . . . (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; (e) Prevent economic waste caused by unreasonable competition; (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines".

3. Art. 6 of the Chicago Convention, entitled "Scheduled air services", reads: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission and authorization".

4. ICAO Working Paper ATConf/6-WP/4 (Fair Competition in International Air Transport), 4 Dec. 2012.

Nevertheless, the issue of fair competition in international air transport has recently attracted significant attention. The growth of the Gulf airlines, itself part of the rise of Asia as the focal point of global growth, has disturbed the competitive balance in international air transport and triggered US and EU airlines to complain about unfair competition and demand the levelling of the playing field. As a result, a debate has been fuelled on the rules of the game in international air transport, which has spread not only within the airline industry, but also in regulatory bodies as well as academia.

The EU is an active (and often proactive) actor in the regulation of international air transport. However, its policies have not always been welcomed for their wisdom either by the international community or by the EU airline industry. For example, the application of the EU Emissions Trading Scheme to international aviation had to be suspended due to the reaction of the international community, which condemned the EU's initiative to afford extraterritorial effect to its regional law.[5] The suspension of the EU scheme with respect to foreign airlines' operations outside the EU left EU network airlines at a disadvantage when competing internationally against third-country airlines, whose home operations are not subject to similar measures. In addition, the EU's action in the area of consumer protection, and in particular its initiative to regulate air passenger rights in the event of flight delay,[6] has been criticized for its incompatibility with international law, in particular the 1929 Warsaw Convention[7] and the 1999 Montreal Convention,[8] which regulate delay.[9] At the other end of the spectrum, EU action in the area of aircraft emissions was what really catalysed action within the ICAO at a moment of defiance and stagnation, culminating in a global scheme for international aviation, namely the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).[10] Equally, the regulation of air

5. Decision 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, O.J. 2013, L 113/1.

6. Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91, O.J. 2004, L 46/1.

7. Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature 12 Oct. 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force 13 Feb. 1933).

8. Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature 28 May 1999, 2242 U.N.T.S. 350 (entered into force 4 Nov. 2003).

9. Arnold and Mendes de Leon, "Regulation (EC) 261/2004 in the light of the recent decisions of the European Court of Justice: Time for a change?!", 35 *Air & Space Law* (2010), 91–112.

10. Assembly Resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Global Market-based Measure (MBM) scheme,

passenger rights by the EU seems to have inspired foreign jurisdictions, which are adopting similar laws, at times modelled on the EU provisions.[11]

This paper examines the EU's response to the calls for fair competition in international air transport by focusing on two recent EU policies, specifically Regulation 2019/712 on safeguarding fair competition[12] and the inclusion of fair competition clauses in ASAs with third States, negotiated either by the Member States or by the EU itself on behalf of the Member States. Considering that Regulation 2019/712 is a unilateral measure that governs issues covered under the ASAs, the interplay between supranational law and international law and, in particular, the potential of supranational law to influence international law in the area of air transport, will be considered with a view to determining the efficiency of the EU policies.

Section 2 which follows sets the stage for the debate. Section 3 critically examines Regulation 2019/712, as well as the operation of fair competition clauses in ASAs to determine whether they are synergistic or mutually conflicting. Section 4 attempts an assessment of the efficiency of EU policies in the area of air transport. Section 5 concludes the analysis.

2. Background to the debate regarding fair competition in international air transport

The economic regulation of international air transport is not an issue that has been agreed upon by sovereign States and regulated multilaterally by means of an international agreement, nor is it an issue that the ICAO has authorization to regulate. Thus, the Chicago Convention does not regulate market access in air transport. However, during the negotiations for its adoption, the States devised a mechanism to exchange traffic rights, based on a number of "freedoms of the air", which they defined in two ancillary international agreements, namely the International Air Services Transit Agreement (IASTA)[13] and the International Air Transport Agreement (IATA)[14]. IASTA

at <www.icao.int/environmental-protection/CORSIA/Documents/Resolution_A39_3.pdf> (all websites last visited 28 March 2020).

11. Correia and Rouissi, "Global, regional and national air passenger rights – Does the patchwork work?", 40 *Air & Space Law* (2015), 123–146.

12. Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) 868/2004, O.J. 2019, L 123/4.

13. International Air Services Transit Agreement (IASTA), opened for signature 7 Dec. 1944, 59

Stat. 1693, 84 U.N.T.S. 389.

14. International Air Transport Agreement, opened for signature 7 Dec. 1944, 59 Stat. 1701, 171 U.N.T.S. 387.

regulates the first two freedoms of the air, which are technical in nature, namely the right to overfly foreign countries without landing and the right to land in foreign countries for non-traffic purposes (e.g. refuelling or aircraft maintenance). IATA regulates the core commercial freedoms, namely, the right to fly from an airline's home country to a foreign country (third freedom) and back (fourth freedom), as well as the right of an airline, on a route that either originates in or is destined for its home country, to carry traffic between two foreign countries (fifth freedom).[15] Unlike IASTA, which counts 133 signatories, IATA has attracted only 11 signatories. The reluctance of States to sign IATA and exchange traffic rights multilaterally resulted in bilateral ASAs. Depending on the bilateral partners' aeropolitical relations, the degree of market access achieved by such agreements varies and ranges from basic connectivity (third and fourth freedom rights) in restrictive ASAs to cabotage rights (eighth and ninth freedom rights) in liberal ASAs.[16]

Bilateral ASAs, which today are estimated at around 4,000,[17] started off being restrictive and their underlying philosophy was equality of outcome rather than equality of opportunity. In traditional ASAs, each party had the right to designate only one airline to operate the agreed services, usually the national flag carrier; traffic rights were exchanged on a *quid pro quo* basis; capacity was predetermined and even though it was tied to demand, the total capacity was shared equally between the parties and not proportionately to the size of each individual market;[18] pricing was subject to the approval of both

15. E.g. the right of KLM to depart from Amsterdam Schiphol, land at New York JFK, deplane some passengers and cargo and enplane new passengers and cargo there and continue to Mexico City International Airport, or the right of SAS to depart from Toronto Pearson Airport, land at Chicago O'Hare International Airport, discharge some traffic and cargo and take on new traffic and cargo there and take off for the final destination in the air carrier's home country, e.g. Stockholm Arlanda Airport.

16. See definition of nine freedoms of the air on the website of the ICAO, extracted from the Manual on the Regulation of International Air Transport (Doc 9626, Part 4), at <www.icao.int /Pages/freedomsAir.aspx>.

17. See WTO's Quantitative Air Services Agreements Review (QUASAR), Part Two, Part A, Introduction to QUASAR, S/C/W/270/Add. 1, I.9. et seq., at <www.wto.org/english/tratop _e/serv_e/transport_e/quasar_ parta_e.pdf>.

18. A typical clause in a traditional ASA regulating capacity would provide: "Each Party shall allow fair and equal opportunity for the designated airlines of both Parties to operate the agreed services between their respective territories so as to achieve equality and mutual benefit, in principle by equal sharing of the total capacity between the Parties". See ICAO Document 9587, Policy and Guidance Material on the Economic Regulation of International Air Transport, 3rd ed. 2008, Appendix 5 (ICAO Template Air Services Agreements), 21–22 (Art. 16), at <www.icao.int/Meetings/atconf6/Documents/Doc%209587_en.pdf>.

governments;[19] and, by and large, all facets of doing business were regulated by national governments. Such economic protectionism prevailed in the years following World War II due to the asymmetry between the thriving United States airspace industry and the destroyed aerospace industries of other countries, especially the United Kingdom, which was still a colonial power. Shielding UK airlines from free market forces was critical in order to prevent the monopolization of international air services by US airlines.

During the era of economic protectionism, the issue of fair competition in international air transport was raised in the context of air carriers based in countries with a small domestic market, which, however, were very active on international routes, in particular the Dutch KLM, the Scandinavian SAS and the Belgian (now defunct) Sabena. Back in 1961, the US complained about the allegedly excessive "fifth freedom traffic" that those European airlines carried to the US in violation of the capacity provisions in the relevant bilateral ASAs. Pursuant to the American view, most of the capacity operated by these airlines across the North Atlantic was not used for traffic between the US and the home country of the carrier (referred to as "primary justification" or "primary entitlement" traffic), but for traffic between the US and third States via the home country of the carriers (referred to as "secondary justification" traffic).[20] This constituted a violation of the capacity provisions in ASAs, which were based on the "understanding" that "the primary objective" of a service was to provide "capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic".[21] Such a wording refers to the most frequently exchanged and thus valuable commercial freedoms of the air, namely the third and the fourth, which entitle an airline to carry traffic from its home country to a foreign country (third freedom)[22] and back (fourth freedom).[23]

The US qualification of traffic between the US and third States via the home country of the aforementioned European carriers as "fifth freedom traffic" was contested, especially by the Dutch and the Scandinavians, who pointed to the fact that such traffic did not qualify as "fifth freedom traffic", but constituted a mere combination of the fourth and third freedom rights. As

19. A typical clause in a traditional ASA regulating pricing (tariffs) would provide for a double approval system, whereby: "The tariffs to be charged by the designated airlines of the Parties for carriage between their territories shall be subject to the approval of both Parties", ibid., at A4-25 (Art. 17(4)).

20. Lissitzyn, "Bilateral agreements on air transport", 30 *Journal of Air Law and Commerce* (1964), 248–263.

21. Ibid.

22. E.g. the right of British Airways to carry traffic from London Heathrow to Los Angeles International Airport.

23. I.e. from Los Angeles to London Heathrow, see Lissitzyn op. cit. *supra* note 20.

a result, no violation of the capacity formula in ASAs could be substantiated. Even though the right of an air carrier to carry traffic from a third State to another third State via its home country constitutes the sixth freedom of the air,[24] rather than the fifth freedom, as claimed by the US, under restrictive ASAs the sixth freedom is not allowed, hence the US view of such traffic as "fifth freedom traffic".[25] Broken down into its constituents, the sixth freedom is a combination of the fourth and the third freedoms. This suggests that even when sixth freedom rights have not been exchanged in air services agreements, an airline can still mount such operations, using the fourth and third freedom rights under two separate air services agreements.

Sixth freedom rights are dependent upon geography and are particularly suited to long-haul, inter-continental operations. They enable airlines based in countries with a small domestic market to participate in the provision of international air services by operating a hub-and-spoke system. Traffic from different (international) spokes is brought to the (national) hub and from there is flown to various destinations. This is the model currently operated by the Gulf airlines, Singapore Airlines, KLM and many others.[26] The allegation that sixth freedom rights amount to unfair competition in international air transport is based on the idea that traffic between two countries belongs only to these countries whose airlines are solely entitled to carry it. The question of whether such operations, when performed on the basis of the fourth and third freedom rights under two separate bilaterals, violate the relevant ASAs or indeed any other legal basis remains controversial.[27]

In the 1970s, the inherent tension between economic protectionism and fair competition became clearer. In 1974, the US adopted the International Air Transportation Fair Competitive Practices Act (IATFCPA) in response to complaints from US airlines that they suffered discriminatory airport charges

24. E.g. the right of KLM to depart from New York JFK, make a stopover at Amsterdam Schiphol to deplane some passengers and cargo and enplane new passengers and cargo – with or without change of aircraft – and continue to its final destination at Dubai International Airport.

25. As Henri Wassenbergh put it: "Under present traditional standard bilateralism, the designated air carriers are not allowed to schedule and operate through-services with one aircraft (or an agreed change of gauge) and one line number from points behind their home country, via their home country to points in foreign countries and carry freely 'sixth' freedom traffic on such through service. As a matter of fact such carriage then would involve 'en route' third country fifth freedom air traffic carriage". See Wassenbergh, "The 'sixth' freedom revisited", 21 *Air & Space Law* (1996), 285–294.

26. For an analysis of the sixth freedom model, see de Wit, *"*Unlevel playing field? Ah yes, you mean protectionism*"*, 41 *Journal of Air Transport Management* (2014), 22–29.

27. See analysis in Lykotrafiti, **"**Air transport and international economic law**"** in El Boudouhi (Ed.), *Les Transports Au Prisme du Droit International Public* (Editions PEDONE, 2019), pp. 101–120.

in certain countries.[28] IATFCPA enabled the US government to implement retaliatory charges against airlines established in such countries when operating in the US. In 1976, the UK denounced its bilateral ASA with the US and succeeded in negotiating a more restrictive version. The US diplomatic defeat sparked the reaction of Congress and triggered the Carter Administration to proclaim:

> "The guiding principle of U.S. aviation negotiation policy will be to trade competitive opportunities, rather than restrictions, with our negotiating partners. We will aggressively pursue our interests in expanded air transportation and reduced prices rather than accept the self-defeating accommodation of protectionism. Our concessions in negotiations will be given in return for progress toward competitive objectives, and these concessions themselves will be of a liberalizing character."[29]

In line with its new policy, the US began to renegotiate its ASAs, entering into the first generation of open skies agreements, most notably with the Netherlands in 1978.[30] Moreover, it de-regulated the domestic air transport market (1978) and expanded the scope of IATFCPA by adopting the International Air Transportation Competition Act (IATCA), which addresses "unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practices against a US air carrier" or "unjustifiable or unreasonable restrictions on access of a US air carrier to foreign markets".[31] The Act established a complaint procedure for US airlines to report cases of discrimination or anticompetitive actions by foreign governments or airlines and empowered the US Department of Transportation "without hearing, but subject to the approval of the President of the United States, [to] summarily suspend the permits of the foreign air carriers of such country, or alter, modify, amend, condition, or limit operations under such permits" and even "restrict operations between such foreign country and the United States by any foreign air carrier of a third country".[32] In practice, the US has refrained from exercising such sweeping powers, following instead the route of

28. The International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 98–443, 98 Stat. 1706 (signed into law on 3 Jan. 1975).

29. *United States Policy for the Conduct of International Air Transportation Negotiations*, Statement of 21 Aug. 1978 (undocketed).

30. Mendes de Leon, "Before and after the tenth anniversary of the Open Skies Agreement Netherlands-US of 1992", 27 *Air & Space Law* (2002), 280–314.

31. 49 U.S.C. app. § 1159(b)(1) (1980) (recodified as 49 U.S.C.A. § 41310 (West 2008)).

32. Ibid.

intergovernmental negotiations and amicable resolution of disputes (see below, section 4).[33]

On the other side of the Atlantic, the debate on fair competition in international air transport followed a more esoteric route and was linked to the objective of establishing a single aviation market. EU air liberalization exposed the problem of illegal State aid. One of the key reasons why liberalization was phased in progressively over a period of ten years (1987–1997) was to enable the heavily subsidized national flag carriers to restructure their operations and return to profitability before competing on a level playing field. EU national flag carriers competed internationally against airlines – especially US airlines – that had been privately owned since the very early days of commercial aviation. Given that illegal subsidies distort competition, one would have expected the US airlines to have complained vehemently about the State-owned EU airlines, which were constantly in the red and being bailed out by their governments. However, until the launch of the US open skies policy in 1992, illegal subsidies were more of an issue domestically than internationally, partly due to the fact that US airlines had long benefited from US government-financed traffic and other privileges (e.g. Air Mail Act of 1930,[34] Fly America Act,[35] and Civil Reserve Air Fleet program[36]).

The opening up of the national markets to competition paved the way for liberalization in international air transport. The US pioneered open skies and launched its eponymous policy in 1992, founded on the idea of multiple airline designations, unrestricted capacity and frequencies, unrestricted route and traffic rights, and free market pricing.[37] The US open skies were "designed to liberalize, to the maximum extent, the aviation markets between and beyond the US and Europe" and aspired to establish open-skies relationships with other regions of the world.[38] Fair competition in international air transport naturally obtained a new meaning, which was reflected in the wording itself of

33. For a critical discussion of IATCPA, see Havel, *Beyond Open Skies – A New Regime for International Aviation*, (Kluwer, 2009), ch. 4 III.

34. Nyrop, "The question of U.S. air mail subsidy", 18 *Journal of Air Law & Commerce* (1951), 409–420.

35. Visit:<www.gsa.gov/policy-regulations/policy/travel-management-policy/fly-america-act>.

36. Visit: <www.transportation.gov/mission/administrations/intelligence-security-emergency-response/civil-reserve-airfleet-allocations>.

37. See Final Order of the US Department of Transportation in the matter of defining "Open Skies", Order 92-8-13, Docket 48130, 5 Aug. 1992.

38. Ibid.

ASAs, which no longer referred to "a fair opportunity to operate",[39] but to "a fair and equal opportunity to compete".[40]

In the aftermath of domestic air transport liberalization, State aid control in Europe tightened. Privatization of national flag carriers became part of, or the outcome of airline restructuring, a process supervised by the European Commission. At the same time, the terrorist attacks of 9/11 inflated the cost of purchasing private "war risk" insurance, a condition necessary for airline operation. In response, the US passed legislation so as to offer the US airlines war risk insurance on terms agreed upon prior to the 9/11 terrorist attacks.[41] Furthermore, the closure of the US airspace for four days resulted in significant operating losses for US airlines, which were addressed by means of cash injections and loan guarantees.[42] Unlike the European Commission, which rendered it clear to the EU airlines that State aid could only be authorized for the loss of traffic during the period of US airspace closure,[43] the US government extended its support to US airlines for loss of traffic beyond that period. The asymmetry in the EU and US approaches triggered a reaction from the European Commission, which, worried that the US package of measures "could have an effect on markets where American and European airlines are in intense competition, i.e. primarily the transatlantic routes",[44] adopted draft legislation to tackle subsidies and unfair pricing practices by third-country airlines (see below, section 3).[45]

By 2007, when the US-EU Air Transport Agreement was signed, the European Commission had gained significant clout in international air

39. Traditional bilaterals provide: "[E]ach designated airline shall have *a fair opportunity to operate* the routes specified in the Agreement", see ICAO Document 9587, Appendix 5 (ICAO Template Air Services Agreements), 21 (Art. 15), cited *supra* note 18.

40. Art. 11(1), entitled "Fair Competition", of the US Model Open Skies Agreement provides: "each designated airline shall *have a fair and equal opportunity to compete* in providing the international air transportation governed by the agreement". See Air Transport Agreement between the Government of the United States of America and the Government of [Country], 12 Jan. 2012, at <www.state.gov/e/eb/rls/othr/ata/114866.htm>.

41. Elias, "Aviation War Risk Insurance: Background and Options for Congress", Congressional Research Service 7-5700, R43715, 5 Sept. 2015, at <fas.org/sgp/crs/misc/R43715.pdf>.

42. Air Transportation Safety and System Stabilization Act, Public Law 107–42, 22 Sept. 2001, at <www.congress.gov/107/plaws/publ42/PLAW-107publ42.pdf>.

43. Commission Communication, The repercussions of the terrorist attacks in the United States on the air transport industry, COM (2001)574 final, 10 Oct. 2001, at 5.1.

44. Ibid., at 1, para 4.

45. Proposal for a Regulation concerning protection against subsidization and unfair pricing practices in the supply of airline services from countries not members of the European Community, COM(2002)110 final, 12 March 2002. For an analysis of the interplay between 9/11 and EU legislative action, see McGonigle, "Past its use-by date: Regulation 868 concerning subsidy and State aid in international air services", 38 *Air & Space Law* (2013), 1–20.

transport.[46] In the seminal 2002 *open skies* judgments, the European Court of Justice delineated the respective competences of Member States and the EU in external aviation relations.[47] In particular, the Court clarified that even though the EU does not have exclusive external competence to conclude ASAs with third countries (which practically means that the Member States have not given up on their sovereignty in this area), it does have exclusive competence whenever it has adopted internal rules relating to the treatment of third-country nationals or has achieved complete harmonization in a certain area.[48] The latter is not the case in the area of external aviation relations.[49] However, the former has materialized in certain areas, such as the pricing of air services by third-country airlines when operating on intra-European routes by virtue of their fifth freedom rights (where a prohibition of price leadership applies).[50] In such areas, the EU is solely competent and the Member States, when negotiating ASAs, should cooperate closely with the EU institutions to fulfil the requirement of unity in the international representation of the EU.[51] In addition, the Court pronounced that whenever the EU has expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive competence.[52]

Following the ECJ's rulings, the European Commission felt empowered to request the Council to mandate it to negotiate comprehensive ASAs with third countries on behalf of the Member States in order to best represent their (and the EU's) interests. Despite some reluctance, the Council agreed to individual mandates (as opposed to a blanket mandate), provided that "the added value"

46. US-EU Air Transport Agreement (25 May 2007, O.J. 2007, L 134/4), amended by Protocol of 25 March 2010 (O.J. 2010, L 223/3).

47. Case C-467/98, *Commission* v. *Denmark*; EU:C:2002:625; Case C-468/98, *Commission* v. *Sweden*, EU:C:2002:626; Case C-469/98, *Commission* v. *Finland*, EU:C:2002:627; Case C-471/98, *Commission* v. *Belgium*, EU:C:2002:628; Case C-472/98, *Commission* v. *Luxembourg*, EU:C:2002:629; Case C-475/98, *Commission* v. *Austria*; Case C-476/98, *Commission* v. *Germany*, EU:C:2002:631; Case C-466/98, *Commission* v. *UK*, EU:C:2002:624.

48. See Case C-471/98, *Commission* v. *Belgium,* paras. 96 and 97.

49. See Art. 3 TFEU, which lists the areas where the EU has exclusive competence, and Art. 4 TFEU, which lists the areas where the EU and the Member States have shared competence. One of these areas is transport. See also para 106 of Case C-471/98, *Commission* v. *Belgium*.

50. Art. 22(1) of Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 Sept. 2008 on common rules for the operation of air services in the Community (Recast), O.J. 2008, L 293/3.

51. Regulation (EC) 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air services agreements between Member States and third countries, O.J. 2004, L 157/7.

52. See para 96 of Case C-471//98, *Commission* v. *Belgium*.

of any EU-level agreement is clearly demonstrated in each case.[53] Within these parameters, the Commission developed the agenda for the EU's external aviation policy.[54] "Ensuring fair competition, i.e. promoting regulatory convergence" in the context of agreements "no longer developed between Member States and third countries, but rather between the [EU] and those countries" became part of the Commission's agenda.[55]

In 2012, the Commission reviewed the EU's external aviation policy and did not hesitate to point to specific countries whose policies might confer unfair competitive advantages on their air carriers, in particular the Gulf States.[56] Considering that the Gulf airlines qualify as sixth freedom air carriers, since they carry traffic between two third countries through their hub airports, the old debate about the legitimacy of such operations was revived, with the Commission stating poignantly: "[R]elations with the Gulf States have in recent years been a largely one-way process of opening EU markets for Gulf carriers, which has created significant imbalances in opportunities".[57] The Commission also expressed doubts about "whether the transparency in the financial performance reporting of some Gulf carriers meets international standards" and lamented the reluctance of some of the Gulf States "to accept or even discuss 'fair competition' clauses with EU Member States individually", calling for coordination "at EU level through comprehensive EU aviation agreements with key countries".[58]

The growth of the Gulf airlines alarmed the legacy airlines, especially on the other side of the Atlantic. In 2015, the "Partnership for Open & Fair Skies",[59] a coalition composed chiefly of the US "Big 3" airlines, namely Delta, American Airlines and United Airlines, issued a "White Paper" alleging that the State-owned Gulf carriers, in particular Emirates, Etihad and Qatar Airways, had relied on over $40 billion in subsidies and other unfair government-conferred advantages in the last decade alone to fuel their growth.[60] The "Big 3" accused the Gulf airlines of using the subsidies to dump

53. Communication from the Commission on relations between the Community and third countries in the field of air transport, COM(2003)94.

54. Commission Communication, Developing the agenda for the Community's external aviation policy, COM(2005)79 final, 11 March 2005.

55. Ibid., at I.2.

56. Commission Communication, The EU's External Aviation Policy – Addressing future challenges, COM(2012)556 final, 27 Sept. 2012, paras. 27 & 50.

57. Ibid., para 50.

58. Ibid.

59. For more information, visit: <www.openandfairskies.com/>.

60. See Delta Airlines, American Airlines and United Airlines, "Restoring Open Skies: The need to address subsidized competition from State-owned airlines in Qatar and the UAE", 28 Jan. 2015, at <www.openandfairskies.com/wp-content/themes/custom/media/White.Paper.pdf>.

capacity on international routes, boosting demand for air transport services beyond global GDP growth and, thereafter, filling up excess capacity by hoovering up other carriers' passengers. They pointed out that the expansion of the Gulf carriers to international routes, in particular to routes to the US, had been facilitated by the 2002 US-United Arab Emirates (UAE)[61] and the 2001 US-Qatar[62] open skies agreements, and stressed that US airlines are not able to make the most of the liberal provisions in the open skies agreements, in view of the low level of demand for travel originating in or destined for the Gulf States, which disables them from mounting, besides fifth and sixth freedom flights, even typical return (i.e. third and fourth freedom) flights. Furthermore, they underlined that if US airlines lose international traffic to the Gulf airlines, they will have to curtail their domestic hub-and-spoke operations, scaling down smaller communities' connection to the main hubs. For all these reasons, the "Big 3" called for an agreement "on measures to address the flow of subsidized Gulf carrier capacity to the United States".[63]

The orchestrated campaign against the Gulf carriers by the "Big 3" and the intense lobbying of the US government has not garnered the anticipated political support. In a recent meeting between President Trump and representatives of the "Big 3", the latter were asked to file a formal complaint with the US Department of Transportation under the IATFCPA in order for their case to be considered.[64] This is precisely what the "US Airlines for Open Skies", a coalition of US airlines in support of US open skies agreements (joined by organizations representing the US travel, tourism and hospitality industries, as well as local communities),[65] have consistently maintained in their letters to the US government.[66]

To date, no complaint has been filed by the US carriers. Whether such inaction may point to the (in)validity of their claims or to pure awareness that the IATFCPA is a unilateral domestic measure that feeds into issues regulated bilaterally between sovereign States and, as such, it is used by the US administration strategically to address the proper implementation of the relevant international agreement, rather than as a nuclear weapon to disrupt, besides diplomatic relations, connectivity between the two countries, is hard

61. Air Transport Agreement between the Government of the United States of America and the Government of the United Arab Emirates, signed on 2 March 2002, at <2009-2017.state.gov/documents/organization/125743.pdf>.

62. Air Transport Agreement between the Government of the United States of America and the Government of Qatar, signed on 3 Oct. 2001, at <2009-2017.state.gov/documents/organization/114398.pdf>.

63. "White Paper", cited *supra* note 60.

64. Regarding IATFCPA complaints, visit <www.transportation.gov/policy/aviation-policy/iatfcpa-complaints>.

65. For more information, visit <openskiescoalition.com/>.

66. All letters and other filings are available at <openskiescoalition.com/filings/>.

to assess.[67] In any event, the fracas caused by the US "Big 3" triggered discussions between the US and Qatar, which culminated in a set of "understandings" or "political commitments" that "airlines should issue public annual reports with financial statements audited externally in accordance with internationally-recognized accounting standards" and "publicly disclose significant new transactions with state-owned enterprises and take steps to ensure that such transactions are based on commercial terms".[68] A similar "understanding" was reached with the UAE.[69]

Even though the campaign against the Gulf carriers has not produced spectacular results in the area of regulatory convergence, it has unequivocally placed the issue of fair competition in international air transport on the agenda of EU policymakers. In 2016, the European Commission was authorized by the Council to negotiate EU-level aviation agreements with the UAE and Qatar. The EU-Qatar negotiations resulted in the Parties initialling a comprehensive air transport agreement in March 2019. Key features of this agreement are "provisions on fair competition with strong enforcement mechanisms to avoid distortions of competition and abuses negatively affecting the operations of EU airlines in the EU or in third countries" and "transparency provisions in line with international reporting and accounting standards to ensure obligations are fully respected".[70]

Aeropolitics seems to have played a role in the conclusion of this agreement. Arguably, the air blockade of Qatar by Saudi Arabia, the UAE, Bahrain and Egypt, effective since 2017, catalysed the conclusion of the agreement. In its press release, Qatar Airways stated that "through this historic agreement…the State of Qatar has demonstrated once again that despite the ongoing intra-regional geopolitical tensions due to the illegal blockade

67. See critical analysis in Havel, who argues that "it is a peculiarity of the IATCA/IATFCPA investigation process . . . that the U.S. Government provides a forum for a private air carrier directly to challenge the sovereign action of a foreign government under an agreement that confers 'bilateral rights' on the U.S. Government", op. cit. *supra* note 33, Ch. 4 III D.

68. Media Note: Understandings with Qatar Seek Level Playing Field, Office of the Spokesperson, 30 Jan. 2018, at <www.state.gov/understandings-with-qatar-seek-level-playing-field/>.

69. Statement from the Press Secretary Regarding the United States-United Arab Emirates Open Skies Understanding, 17 May 2018, at <www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-united-states-united-arab-emirates-open-skies-understanding/>.

70. European Commission Press Release IP/19/1490, EU and Qatar reach aviation agreement, 4 March 2019.

imposed on the nation, it remains a leader on the global stage".[71] Having said that, the agreement is not isolated from Qatar's external aviation policy, which seems to encourage openness and cooperation. Qatar Airways is the only Gulf airline that has joined a global airline alliance (i.e. oneworld) and that has acquired significant equity stakes in fellow airlines. Recently, Qatar Airways and American Airlines resumed their codeshare agreement (which was suspended in 2017 due to the allegations about illegal subsidization), bolstering Qatar's quest for cooperation and synergies.[72]

Unlike Qatar, the UAE refused to enter into negotiations with the EU to reach a comprehensive air transport agreement, contending that the European Commission's draft text proposal lacked ambition and pointing out that a potential open skies agreement would need to "provide for full and immediate liberalization going beyond what already exists – specifically including full and immediate liberalization of third, fourth, and fifth-freedom traffic rights."[73] The UAE has concluded bilateral ASAs with most of the EU Member States, safeguarding in some cases fifth freedom rights. Such agreements, in synergy with the 2002 US-UAE open skies agreement, which is also permissive of fifth freedom rights, legitimize Emirates' operations from Dubai to New York JFK via Milan, Italy, and from Dubai to Newark via Athens, Greece, which have been a bone of contention for US airlines. Therefore, it is not surprising that the UAE saw no added value in accepting the EU's terms on an array of issues, including fair competition, without, at the same time, being offered more market access. This is even more so considering the hostile climate that the UAE airlines, i.e. Emirates and Etihad, have often faced when exercising their traffic rights or investing in EU airlines.

Fifth freedom rights seem also to have been a bone of contention in the case of Brazil. The EU initialled a comprehensive air transport agreement with Brazil in 2011, which would "ensure a level playing field for fair competition between EU and Brazilian airlines".[74] However, the signing of the Agreement was postponed twice and in 2017 Brazil expressed its lack of interest in the

71. Qatar Airways Press Release of 5 Feb. 2019, Qatar and the European Union Conclude Negotiations on Landmark Comprehensive Air Transport Agreement, at <www.qatarairways.com/en/press-releases/2019/February0/qatar-and-the-european-union-conclude-negotiations-on-landmark-c.html>.

72. Qatar Airways Press Release of 25 Feb. 2020, Qatar Airways and American Airlines Sign Strategic Partnership Deal and Codeshare Agreement, at <https://www.qatarairways.com/en/press-releases/2020/February/QRAACodeshare.html?activeTag=Press-releases>.

73. Buyck, "UAE Rebuffs Open Skies Talks With the EU", AINonline, 16 Jan. 2019, at <www.ainonline.com/aviation-news/air-transport/2019-01-16/uae-rebuffs-open-skies-talks-eu>.

74. European Commission Press Release IP/11/327, Breakthrough in EU-Brazil negotiations on far-reaching aviation agreement, 18 March 2011.

negotiations due to the EU's refusal to grant fifth freedom traffic rights, despite championing fair competition.[75] The EU paused the negotiations in March 2018, following which Brazil concluded bilateral open skies agreements with the UK, the Netherlands and Luxembourg, reserving fifth freedom rights for Brazilian airlines.[76] Interestingly, in 2011 Brazil signed an open skies agreement with the US, which was eventually ratified in 2018, providing for the full liberalization of fifth freedom rights.[77]

The EU is currently negotiating an inter-regional agreement with the Association of South East Asian Nations, which, when concluded, will be the first block-to-block agreement of its kind.[78] Reportedly, fifth freedom rights have once again been a sticking point between the two sides.[79]

In the following section, two recent EU policies to promote fair competition in international air transport will be examined with a view to assessing the efficiency of the EU strategy in that area.

3. EU policies to safeguard fair competition in international air transport

3.1. *Regulation (EU) 2019/712, repealing Regulation (EC) 868/2004*

As already mentioned, the basket of measures adopted by the US to address the repercussions of 9/11 for US airlines triggered a legislative response from the EU, namely Regulation 868/2004.[80] The objective of the Regulation was to protect EU airlines against the subsidization of third-country airlines and unfair pricing practices adopted by the latter when operating on routes to and from the EU.[81] Therefore, the scope of the Regulation was limited to subsidies

75. Boadle, "Brazil plans to end Open Skies negotiation with EU", Reuters, 21 Dec. 2017, at <www.reuters.com/article/brazil-aviation-eu/brazil-plans-to-end-open-skies-negotiation-with-eu-idUSL1N1OK1MM>.

76. Buyck, "Brazil Pushes Bilateral Open Skies Deals with EU Countries", AINonline, 15 Aug. 2018, at <www.ainonline.com/aviation-news/air-transport/2018-08-15/brazil-pushes-bilateral-open-skies-deals-eu-countries>.

77. TIAS 18-0521, Agreement between the USA and Brazil, signed at Brasilia, 19 March 2011; entered into force 21 May 2018; Art. 2(1).

78. Hololei, Keynote Speech, International Aviation Club, Washington DC, 23 July 2019, at <ec.europa.eu/transport/sites/transport/files/2019-07-23-international-aviation-club-dc.pdf>.

79. Meszaros, "Asean-EU Air Transport Deal Near Completion", AINonline, 6 Dec. 2018, at <www.ainonline.com/aviation-news/air-transport/2018-12-06/asean-eu-air-transport-deal-near-completion>.

80. Regulation (EC) 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidization and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, O.J. 2004, L 162/1.

81. Ibid., Arts. 1 and 2 of the Regulation.

and unfair pricing practices rather than to any measure or practice that might distort competition. For an action to be brought successfully, it was necessary that injury be caused to the "Community industry", i.e. the totality of the EU airlines competing on the contentious routes or at least the ones holding a majority share on those routes.[82] The determination of injury was based on positive evidence concerning in particular the level of fares on the relevant city-pairs and their impact on EU airlines or the existence of countervailable subsidies.[83]

In the fifteen years that the Regulation was in force, i.e. from 2004 until 2019, when it was eventually repealed, it was never applied. The reasons for its ineffectiveness are well-documented[84] and have been acknowledged by the EU institutions themselves.[85] Most crucially, proving "unfair pricing practices" is no easy task since airlines rely on sophisticated yield management systems to determine their pricing practices, which are also proprietary and commercially sensitive.[86] Equally, proving the existence of "countervailable subsidies" is virtually impossible in the case of State-owned and controlled airlines. The high evidential burden was also due to the airlines having to adduce evidence of the existence of unfair pricing practices or subsidies, injury, and a causal link between the unfair pricing practice or subsidy and the injury.[87] *Locus standi* was also an issue since actions could only be brought by the "Community industry", as opposed to individual EU airlines or even Member States.[88] The Commission first announced its intention to develop "a more appropriate and effective instrument . . . to safeguard fair and open competition in the EU's external aviation relations" in 2012.[89] A proposal for a Regulation on safeguarding competition in air transport was issued in 2017 and Regulation 868/2004 was finally repealed

82. Ibid., Arts. 3(b) and 3(d).
83. Ibid., Arts. 6 and 7.
84. See MCGonigle, op. cit. *supra* note 45.
85. Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An Aviation Strategy for Europe, SWD(2015)261 final, 7 Dec. 2015. See also, Proposal for a Regulation of the European Parliament and of the Council on safeguarding competition in air transport, repealing Regulation (EC) 868/2004, COM(2017)289 final, 8 June 2019.
86. McGonigle, "Fair competition, subsidy, and State aid clauses in international air services agreements", 37 *Annals Air & Space Law* (2012), 199–222.
87. Art. 7(1), Regulation 868/2004, cited *supra* note 80.
88. Ibid., Art. 7(1).
89. Commission Communication cited *supra* note 56, para 26.

and replaced by Regulation 2019/712, which entered into force on 30 May 2019.[90]

The new Regulation addresses the chief deficiencies of its predecessor. Specifically, its scope is wider, as shown by its title, which refers to "safeguarding competition in air transport" as opposed to "protection against subsidization and unfair pricing practices". Thus, the new Regulation covers "practices distorting competition", meaning "discrimination and subsidies".[91] Discrimination is defined as "differentiation of any kind without objective justification in respect of the supply of goods or services" in areas such as public services, air navigation, airport facilities and services, fuel, ground handling, security, computer reservation systems, slot allocation, and charges.[92] The widening of the scope of the Regulation entails the expansion of its geographical coverage. Thus, whilst under the old Regulation unfair pricing practices had to be established on routes to or from the EU, under the new Regulation "practices distorting competition" are examined not only in the context of city-pair routes, but also for their effects on "the wider air transport network".[93] Moreover, *locus standi* is now also granted to individual airlines, as well as Member States.[94] The evidential burden has been lightened in that complaints can now be brought when there is "*prima facie* evidence of a threat of injury" (rather than evidence of injury).[95] Consequently, the Commission's investigative powers have been heightened and it is now able to carry out investigations in third countries, albeit subject to the consent of the third-country entity concerned and in the absence of an objection by the third country.[96]

Although Regulation 868/2004 was never applied, its effectiveness has also been questioned in the light of the available redressive measures, namely "duties" upon the third-country airlines concerned,[97] a remedy developed for trade in goods rather than services.[98] Regulation 2019/712 expands the types of redressive measures, providing, next to "financial duties", for "any operational measure of equivalent or lesser value, such as the suspension of concessions, of services owed or of other rights of the third-country air

90. Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) 868/2004, O.J. 2019, L 123/4.
91. Ibid., Art. 1(1), in conjunction with Art. 2(6).
92. Ibid., Art. 2(8), in conjunction with Recital 10.
93. Ibid., Recital 15.
94. Ibid., Art. 4(1), in conjunction with Recital 13.
95. Ibid., Art. 4(1), in conjunction with Recital 14.
96. Ibid., Art. 5(8), in conjunction with Recital 16.
97. Art. 9 of Regulation (EC) 868/2004, cited *supra* note 80.
98. Commission Staff Working Document, cited *supra* note 85.

carrier".[99] Most importantly, it rules out redressive measures that consist of the "suspension or limitation of traffic rights which are granted by a Member State to a third country".[100] By the same token, if the EU has entered into an air transport-related agreement with a third country, the Commission may suspend the investigation if it appears more appropriate to address the issue "exclusively under the dispute settlement procedures" established by the relevant agreement.[101] It may also terminate the investigation if it concludes that adopting redressive measures would be against the Union interest.[102] The preference of the EU for political rather than legal solutions is also evident in the right afforded to EU Member States to address a practice distorting competition exclusively under the dispute settlement procedures applicable under their bilateral agreements with the third-country concerned.[103]

Arguably, the effectiveness of the new Regulation will be determined, first, by its ability to attract legitimate claims and, second, by its ability to address them fairly and expeditiously. By and large, the expanded scope of the Regulation, the new provisions on standing, and the lower evidential burden on claimants, in conjunction with the benchmark of Union interest (which is also reflected in the provision that redressive measures shall not enter into force before the threat of injury has developed into actual injury),[104] welcome legitimate claims.

Whether the new Regulation will prove effective in redressing fair competition is harder to assess. For example, it is an issue whether it is apt to redress "covert" types of discrimination, such as unduly burdensome administrative procedures (e.g. in the allocation of visas for the air carrier's staff, in customs clearance, or even in the issue of permits). Quantifying and monetizing the impact of such measures and proving injury as a result, in order for financial duties or operational measures of equivalent effect to be imposed, requires, besides sophisticated economic analysis, the production of evidence. Even though the Regulation empowers the Commission to carry out *in situ* inspections in foreign jurisdictions, these cannot be unannounced. In addition, whilst the Commission is entitled to make "provisional or final findings, affirmative or negative" on the basis of the facts and evidence available, where access to the necessary information is refused or delayed, or where the

99. Art. 14(3) in conjunction with Recital 24 of Regulation EU 2019/712, cited *supra* note 90.
100. Ibid., Recital 27.
101. Ibid., Art. 6, in conjunction with Recital 17.
102. Ibid., Art. 13(2) (b), in conjunction with Art. 3.
103. Ibid., Art. 6(2).
104. Ibid., Art. 14(2).

investigation is significantly impeded,[105] it is unlikely that it will jump to politically sensitive conclusions in the absence of robust evidence.[106]

The most important innovation of Regulation 2019/712 is that it regulates its interface with: i) the ASAs concluded by Member States with third countries; and ii) the ASAs (or air transport agreements or any other agreement which contains provisions on air transport services) to which the Union is a party. Thus, unlike Regulation 868/2004, which gave priority to ASAs concluded by Member States with third countries,[107] the new Regulation takes a more nuanced approach in that, even though the Preamble declares that "[F]air competition between air carriers should preferably be addressed in the context of air transport or air services agreements with third countries",[108] the operative part gives priority to the Commission, unless the Member States concerned notify the Commission of their intention to address the issue in the context of their ASAs.[109] Moreover, unlike Regulation 868/2004, whose objective was not to "preclude the application of any special provisions in agreements between the Community and countries not members of the European Community",[110] the new Regulation gives the Commission discretion to either conduct an investigation under the Regulation or to address the issue in the context of its international agreement with the third country concerned.[111]

Comprehending the complementarity between the Regulation and the relevant ASAs is critical in order to assess the efficiency of the EU strategy on fair competition in international air transport. The next section examines the operation of fair competition clauses in ASAs with a view to determining whether the new Regulation and such clauses are synergistic or mutually exclusive.

3.2. *Fair competition clauses in air services agreements*

In 1946, the US and the UK entered into an ASA, whose text became the blueprint for future bilateral ASAs. This agreement, named after Bermuda, where it was signed, laid down a number of principles to regulate capacity. The

105. Ibid., Art. 9.

106. Goeteyn and Killick, "The new regulation on safeguarding competition in air transport: An effective enforcement tool?", Expert Guides, 17 May 2019, at <www.expertguides.com/articles/the-new-regulation-on-safeguarding-competition-in-air-transport-an-effective-enforcement-tool/arhgfncw>.

107. Art. 1, in conjunction with Recital 5, Regulation 868/2004 cited *supra* note 80.

108. Recital 7, Regulation 2019/712 cited *supra* note 90.

109. Ibid., Art. 6(2), in conjunction with Recital 18.

110. Art. 1(3), Regulation 868/2004 cited *supra* note 80.

111. Art. 6, in conjunction with Recital 17, Regulation 2019/712 cited *supra* note 90.

first principle provided that "there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex".[112] This principle, which affords the airlines the freedom to operate services at the frequency/capacity they consider justified, is qualified by the principles that: (i) air carriers operating on trunk routes shall take into consideration the interests of their foreign "competitors" so as not to unduly affect their services on the same routes; (ii) the primary objective of air services is the provision of capacity adequate for the traffic demands between third and fourth freedom markets; and (iii) fifth freedom operations shall be offered at the capacity required by traffic demand especially between third and fourth freedom markets, after taking account of local and regional services in the "through" (i.e. connection) market.[113]

The freedom afforded to airlines to operate within the parameters of the Bermuda capacity principles amounts to their "fair and equal opportunity . . . to operate". Such a wording reflects the objective set by Article 44(f) of the Chicago Convention to "insure . . . that every contracting State has a fair opportunity to operate international airlines".[114] Even though the content of Bermuda's primordial fair competition clause is unlike today's concept of fair competition, it provided for a system of controlled competition, whereby capacity was not predetermined and allocated *ex ante*, but related to traffic needs, taking into consideration both the public's requirements for air services and the requirements of both trunk-line operations and local or regional operations.[115] Similar clauses were replicated in Bermuda-type ASAs and were usually part and parcel of the relevant provisions regulating capacity.[116]

Bermuda was denounced in 1976 by the UK, which considered that the capacity principles, and especially the relaxed approach towards fifth freedom operations, benefited the US airlines at the expense of UK carriers.[117]

112. Agreement between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services between their respective territories, 11 Feb. 1946, US-UK; 60 Stat. 1499, Sections 4–6 of the Final Act.

113. For analysis of the Bermuda capacity principles, see Diamond, "The Bermuda Agreement revisited: A look at the past, present and future of bilateral air transport agreements", 41 *Journal of Air Law & Commerce* (1975), 419–496.

114. Chicago Convention, cited s*upra* note 1.

115. Diamond, op. cit. *supra* note 113.

116. See e.g. Agreement between the Government of the Commonwealth of Australia and the Austrian Federal Government relating to Air Services, 22 March 1967, Australian Treaty Series 1967 No. 10, Art. 8, entitled "Capacity regulations", at <www.austlii.edu.au/au/other/dfat/treaties/1967/10.html>.

117. Hill, "Bermuda II: The British Revolution of 1976", 44 *Journal of Air Law & Commerce* (1978), 111–129.

Bermuda II of 1977, a diplomatic success of the UK, curtailed the US's fifth freedom rights and limited the number of US carriers serving London. Paradoxically, in the Preamble to the Agreement, the Parties "resolved to provide fair and equal opportunity for their designated airlines to compete in the provision of international air services" and regulated capacity in an Article entitled "Fair Competition", whereby "the designated . . . airlines . . . shall have a fair and equal opportunity to compete…".[118] Even though the evolution in the wording between Bermuda I and Bermuda II from "a fair and equal opportunity to *operate*" to "a fair and equal opportunity to *compete*" respectively was not representative of any opening up of the bilateral markets to competition, it underscored the significance of fair competition in international air transport, as well as the different perceptions of States as to the concept of fair competition.

By the year 1992, when the US launched its open skies policy, fair competition reflected the desire "to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation".[119] The shift of power from national governments to airlines extended not only to the frequency and capacity of international air transportation, but also to pricing. Airlines were thus free to determine these factors "based upon commercial considerations in the marketplace".[120] Even though the wording of the fair competition clause has not evolved since Bermuda II (i.e. "a fair and equal opportunity for the designated airlines to compete"),[121] its content has expanded to cover increased market access, i.e. unlimited fifth freedom rights, and free pricing, subject only to the competition law objectives of preventing "unreasonably discriminatory prices or practices", protecting "consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position", and protecting "airlines from prices that are artificially low due to direct or indirect governmental subsidy or support".[122]

118. See Art. 11 of the Agreement between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Air Services, 23 July 1977, 28 U.S.T. 5367.

119. See e.g. the Preamble to the US-Switzerland Air Transport Agreement of 15 June 1995, at <2009-2017.state.gov/documents/organization/114329.pdf>.

120. Ibid., Art. 11.

121. However, the Parties' desire in the Preamble to open skies agreements "to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation" was substituted for the Parties' resolution in the Preamble to Bermuda II "to provide fair and equal opportunity for their designated airlines to compete in the provision of international air services", US-Switzerland Agreement cited *supra* note 119, Art. 11 and Preamble.

122. Ibid., Art. 12.

Until the second generation of open skies agreements, the issue of subsidies as an element that may affect fair competition had not been raised or *a fortiori* regulated in ASAs. Nor did the US definition of open skies – or indeed the US Model Open Skies Agreement[123] – refer to subsidies. The need to control subsidies was first raised in the second generation of open skies agreements in the context of pricing.[124] The 2007 US-EU Air Transport Agreement further expanded the scope of fair competition in international air transportation, addressing subsidies as a separate issue rather than as a function of pricing. Thus, already, in the Preamble to the Agreement, the Parties expressed their desire "to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation" and recognized "that government subsidies may adversely affect airline competition".[125] The importance the Parties attached to fair competition is illustrated by their choice to have an autonomous fair competition clause in Article 2 (following the "definitions" clause in Art. 1), reading: "Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement". These principles were enunciated in Article 14 on government subsidies and support and Article 20 on competition.

Unlike the Treaty on the Functioning of the European Union, which offers a descriptive definition of State aid[126] that has been interpreted extensively by the European Courts and applied by the European Commission and the EU Member States in myriads of cases since the late 1950s,[127] the US-EU Air Transport Agreement does not define a subsidy, but refers non-exhaustively to examples thereof, "including capital injections, cross-subsidization, grants, guarantees, ownership, relief or tax exemption, by any governmental entities".[128] The sensitivity of the issue can be sensed in the Memorandum of Consultations accompanying the Agreement, whereby while the EU pointed out that the TFEU "does not prejudice in any way the rules in Member States governing the system of property ownership", the US responded that "government ownership of an airline may adversely affect the fair and equal

123. Air Transport Agreement between the Government of the United States of America and the Government of [Country], 12 Jan. 2012, at <www.state.gov/e/eb/rls/othr/ata/114866.htm>.

124. See e.g. Art. 12 of US-France Air Transport Agreement of 18 June 1998, at <2009-2017.state.gov/documents/organization/114271.pdf>.

125. US-EU Agreement cited *supra* note 46.

126. Art. 107(1) TFEU reads: "… any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

127. See Case 30/59, *Steenkolenmijnen* v. *High Authority,* EU:C:1961:2.

128. Art. 14(4), US-EU Agreement cited *supra* note 46.

opportunity of airlines to compete in providing the international air transportation governed by this Agreement".[129] It is perhaps for this reason that the parties devised a mechanism of consultation to resolve relevant issues[130] before resorting to arbitration[131] or terminating the Agreement.[132]

In the areas of antitrust and abuse of dominance, the Parties "affirmed that their respective competition regimes are applied in a manner to respect the fair and equal opportunity to compete accorded to all airlines of the Parties, and in accordance with the general principle of protecting and enhancing competition in markets as a whole, notwithstanding possible contrary interests of individual airline competitors".[133] The ultimate objective of the Agreement is regulatory convergence (including) in the area of competition[134] and the means to achieve it is close cooperation between the parties' competition authorities.[135] In stark contrast to subsidies (and indeed any other issue that may arise under the Agreement), competition-related disputes may not be submitted to arbitration.[136] Unless a solution can be reached by the parties' Joint Committee,[137] it seems that the only path available is terminating the Agreement. It is unclear whether the right to "revoke, suspend or limit the operating authorizations or technical permissions or otherwise suspend or limit the operations of an airline" may be exercised in the event of alleged violations of competition law.[138] The preference for consultations and negotiated solutions is in line with the spirit of the Agreement for regulatory convergence.

The EU reached a similar comprehensive air transport agreement with Canada in 2009, based on the same principles of fair competition.[139] Unlike the US-EU Agreement, which regulated State subsidies and competition separately, the Canada-EU Agreement tackled both issues jointly, laying the emphasis however on subsidies.[140] The parties recognized "that fair competitive practices by airlines are most likely to occur where these airlines

129. Ibid., para 34.

130. Ibid., Art. 14(2) and (3), in conjunction with Art. 18(4) (d), as amended by Art. 5(4)(c) of 2010 Protocol.

131. Ibid., Art. 19.

132. Ibid., Art. 23.

133. Ibid., see Art. 20(1), in conjunction with Art. 3, and paras. 44–45 of the Memorandum of Consultations.

134. Ibid., Art. 20(2), in conjunction with Art. 2 of Annex 2.

135. Ibid., Art. 20(3), in conjunction with Annex 2.

136. Ibid., Art. 19(1).

137. Ibid., Art. 18(2).

138. Ibid., Art. 5(c), in conjunction with Art. 7(1).

139. The 2009 Canada-EU Air Transport Agreement is available at <ec.europa.eu/transport/sites/transport/files/modes/air/international_aviation/country_index/doc/canada_final_text_agreement.pdf>.

140. Ibid., Art. 14.

operate on a fully commercial basis and are not State subsidized" and "the conditions under which airlines are privatized, the removal of competition distorting subsidies, equitable and non-discriminatory access to airport facilities and services and to computer reservation systems are key factors to achieve a fair and competitive environment".[141] An innovative feature of the Agreement is the strong enforcement mechanisms that have been provided, which entitle the parties to revoke the operating authorization of an airline of the other party where it has been determined that conditions in the territory of the other party are not consistent with a fair and competitive environment and are resulting in a significant disadvantage or harm to their airlines.[142] However, such action "shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary", "it shall be exclusively directed towards the entity benefiting from the [anticompetitive] conditions" and it shall be without prejudice to the right of any party to seek dispute settlement through formal consultations, mediation or arbitration.[143]

Having examined both Regulation 2019/712 and the fair competition clauses in the ASAs, the next section turns to the question of whether unilateral action under the Regulation could defeat the purpose of the fair competition provisions in ASAs, alienating the EU and its Member States from its partners, or whether the Regulation merely reinforces the effectiveness of the fair competition clauses in ASAs.

4. Assessing the efficiency of the EU strategy in the area of fair competition in international air transportation

Assessing the efficiency of the EU strategy to safeguard fair competition in international air transport is challenging, not least because of the array of EU policies that feed into competition beyond the EU competition and State aid regime, such as the EU Emissions Trading Scheme (EU ETS), the EU external aviation policy and even Regulation 261/2004 on air passenger rights. Arguably, the allegations against the Gulf airlines triggered the EU finally to repeal Regulation 868/2004 and replace it with a new instrument that feeds directly into commitments and obligations undertaken internationally under ASAs. The question which arises is whether unilateral action under Regulation 2019/712 is compatible with commitments undertaken either bilaterally or multilaterally under the ASAs or whether it defies international

141. Ibid., Art. 14(1).
142. Ibid., Art. 3(3).
143. Ibid., Art. 14(5).

commitments, estranging the EU from its partners and even harming the EU Member States' interests.

To answer this question, one needs to consider, first, the legitimacy of the relevant EU policies and, second, the legitimacy of the EU itself to impose such policies at the international level. Looking first at the issue of subsidies, the EU has pioneered a system of strict State aid control, whereby the types of aid and the conditions under which national governments can grant such aid to their airline and airport industry are clearly defined in transparent and readily accessible instruments.[144] Moreover, prevention and deterrent mechanisms, such as the notification and the stand-still obligation,[145] and the obligation to recover illegal aid with interest,[146] are activated to ensure the effectiveness of the EU State aid regime, which is ultimately supervised by the EU courts. The gradual tightening of the rules along with airline and airport liberalization and privatization, and the respective tightening of the European Commission's enforcement powers, have resulted in several EU airlines, such as Sabena, Olympic Airways, Malév, Cyprus Airways, and Air Berlin exiting the market. Therefore, the EU appears to have the moral weight to demand that third-country jurisdictions subject their airline and airport industry to equally strict rules.

In the area of competition, the EU has pioneered regulatory convergence, a goal that in air transport has been promoted through the EU's external aviation policy. Comprehensive air transport agreements, such as the agreement with the US and Canada, are explicit about the overarching objective of regulatory convergence and set mechanisms of regular meetings of the Parties' Joint Committee in place, to promote such an objective through consultations and the exchange of best practice. The creation of a Common Aviation Area with the EU's neighbouring countries, whereby the latter obtain access to the EU single aviation market in exchange for complying with EU laws, including competition law, is another pillar of the EU's external aviation policy.[147] Even though the EU's strategy to promote its own agenda, including its laws, may create suspicion and disbelief, the EU is transparent about its objectives. All policy documents are published on its website and are easily accessible to the general public. Therefore, the EU does not appear to have a hidden agenda or to promote objectives that are not in the public interest. Most crucially, the legitimacy of the EU to promote regulatory convergence in very many areas, including competition, stems from its strictness towards first and foremost its

144. See especially Communication from the Commission – Guidelines on State aid to airports and airlines, O.J. 2014, C 99/3.

145. Art. 108(3) TFEU.

146. Commission Notice on the recovery of unlawful and incompatible State aid, O.J. 2019, C 247/1.

147. Commission Communication cited *supra* note 56.

own airlines. In fact, the latter have been vocal in stating that certain EU policies inflict harm on the EU airline industry in the name of an unrealistic view of global competition. The EU ETS, Regulation 261/2004 on air passenger rights, the EU State aid regime, and night curfews at EU airports are typical examples of such policies.

Looking more specifically at whether Regulation 2019/712 is in conflict with ASAs in that it provides for unilateral action, whereas ASAs provide for mutually agreed actions through dialogue and consultations, one notices that unilateral action under the Regulation is frozen when the enforcement mechanisms under the ASAs are triggered. Even though the Regulation signals a shift of power from the Member States to the EU, it does not trespass on the Member States' competence in the area of concluding ASAs with third countries. First, the EU can only negotiate ASAs with third countries on behalf of its Member States if mandated by the latter. Second, when the issue of fair competition is raised in the context of bilateral ASAs with third countries, EU Member States retain their power to block the Commission's unilateral action under the Regulation in order "to address the practice distorting competition exclusively under the dispute settlement procedures contained in their respective air transport or ASAs or any other agreement which contains provisions on air transport services concluded with a third party", albeit provided that all the Member States concerned agree to that.[148] Even though the Commission retains its power to resume an investigation where a practice distorting competition persists,[149] the Regulation is adamant that the redressive measures under the Regulation "shall not lead the Union or the Member States concerned to violate air transport or ASAs or any provision on air transport services included in a trade agreement or any other agreement concluded with the third country concerned".[150]

In the event that the Union is a party to an ASA concluded with a third country, the Regulation gives the Commission the discretion to decide whether to address a practice distorting competition under the Regulation or under the dispute settlement procedure established by the Agreement.[151] However, the proviso that redressive measures under the Regulation shall not violate the relevant international agreement applies. Therefore, it appears that the EU Regulation and fair competition clauses in ASAs are interlocking rather than incompatible. Arguably, the Regulation reinforces compliance with commitments undertaken under the ASAs and, in the event of default,

148. Recital 18, in conjunction with Art. 6 of Regulation (EU) 2019/712, cited *supra* note 90.

149. Ibid., Recital 18.

150. Ibid., Art. 14(6).

151. Ibid., Recital 17, in conjunction with Art. 6.

with the relevant enforcement mechanisms and redressive measures thereunder.

Questioning the legitimacy of the EU Regulation and the Commission's action thereunder may be pre-empted by the very fact that the EU may draw such legitimacy from the ASAs themselves. For example, the 2009 Canada-EU comprehensive air transport agreement explicitly authorizes the Parties to take unilateral action to address anti-competitive practices without first having to exhaust or even trigger the Agreement's enforcement mechanisms.[152] Such action includes the right to revoke an airline's operating permission or authorization in the event that it benefits from anticompetitive conditions in the territory of the other Party. The limits of such a right are set by the Regulation itself, which rules out "any suspension or limitation of traffic rights which are granted by a Member State to a third country".[153]

Last but not least, Regulation 2019/712 is not an EU innovation. The US IATFCPA has co-existed with ASAs since 1975. Even though it is beyond the scope of this paper to compare the two instruments, they both constitute unilateral domestic measures that address issues regulated bilaterally (or multilaterally) by means of international agreements. They were both adopted pursuant to complaints by national airlines about unfair competition in foreign markets and, in spite of the mantle of fair competition, they are protective of national airlines. The tension between championing fair competition on the one hand and taking unilateral measures to protect national airlines on the other hand, is a by-product of the regulation of international air transport along the lines of ASAs. Whilst there is a patronizing connotation in unilateral measures to counter "anti-competitive" actions of foreign States (and their airlines), since they presuppose prior assessment from a position of superiority, such measures can be used as a tool to achieve compliance with ASAs, when the latter lack enforcement mechanisms, besides the nuclear weapon of denunciation.

Using the IATFCPA complaint and investigation procedure as a benchmark to assess the EU measures, it is interesting to note that even though the US Senate has defended the legitimacy of unilateral countermeasures on the grounds that they would be permissible under general international law principles of retorsion (i.e. self-defence), even if they would, in themselves, comprise a breach of the bilateral ASA, in practice the US has refrained from either suspending a foreign carrier permit or denouncing an ASA. Instead, it has used the IATFCPA procedure to address the issue with bilateral partners and resolve it amicably.[154] The EU Regulation presents the advantage of time

152. Art. 14(5), Canada-EU Agreement cited *supra* note 139.
153. Recital 27, Regulation 2019/712 cited *supra* note 90.
154. Havel, op. cit. *supra* note 33.

in that, postdating the US Act by 45 years, in an era when fair competition clauses are becoming prominent in open skies agreements, it enables the EU to ventilate fair competition concerns and stage the debate about a level playing field in international air transport.

Arguably, the "Brussels effect" of the EU measures – i.e. their ability to achieve *de facto* and *de jure* regulatory globalization by obliging third-country airlines to comply with EU standards when serving the EU market as a condition of market access and, thereafter, lobbying their governments to adopt the same standards domestically so as to ensure that competition against domestic air carriers be on equal terms – stumbles upon the very regulation of market access along the lines of bilateral (or multilateral) ASAs.[155] To the extent that the regulatory target is air services and such services are regulated in ASAs, the EU has no power to introduce new standards or unilaterally raise or lower the existing ones without the consent of its bilateral partners. Moreover, even though the EU has the right to denounce an ASA to which it is a party, if its standards are not complied with, this is a zero-sum proposition, because connectivity between the relevant markets is going to be disrupted altogether, since tit-for-tat retaliation usually extends also to third country airlines and their right to serve the relevant markets by virtue of their fifth freedom rights. Last, to the extent that fair competition in international air transport depends (besides on typical competition and State aid law) also on issues relevant to taxation, labour standards, passenger rights, environmental standards, etc., unless such issues are covered under the ASAs or regulated multilaterally at international level, the EU has no authority to challenge the operation of foreign airlines in its jurisdiction on the grounds that it forces stricter standards on its own airlines, or, for that matter, demand compliance with EU standards.

Even though the "Brussels effect" of the examined EU measures may be constrained by the rigidity of market access in international air transport, the EU has been successful, first, in convincing its Member States to authorize the European Commission to negotiate ASAs with third countries on their behalf, and second, in progressively introducing into such ASAs parameters which influence competition (e.g. social and environmental issues). The analysis suggests that the new Regulation functions synergistically with fair competition clauses in ASAs, creating a positive feedback loop that paves the way for regulatory globalization.

155. Bradford, "The Brussels effect", 107 *Northwestern University Law Review* (2012), 1–67.

5. Conclusion

This paper examined the context within which recent allegations against the Gulf airlines have been voiced and the EU's response to the associated calls for a level playing field in international air transport. The scope of the analysis was limited to a couple of recent EU policies on fair competition, namely the inclusion of fair competition clauses in ASAs and Regulation 2019/712. The interplay between these policies was examined to determine their complementary or conflicting nature and, ultimately, the wisdom of the EU strategy in the area of fair competition in international air transport. It was found that these policies are interlocking and mutually reinforcing. Even though the efficiency of the EU strategy can only be assessed safely if all EU policies that feed into fair competition in international air transport are examined, the analysis suggests that the EU has now added to its toolbox two powerful instruments to pursue its objectives. What is still to be seen is the implementation of these instruments in practice and the determination of the EU to exercise leadership in international aviation, a mission that can only be fulfilled if it stands by the very principles that seem to permeate both the Chicago Convention and EU law as a whole.